Henry Gillies, and others, Magiſtrates, Councellors and Deacons of the Burrough of *Linlithgow*, - - - - } APPELLANTS in the Original, and RESPONDENTS in the Croſs Appeal.

Allan Wauch, and others, pretended Magiſtrates, Councellors and Deacons of the ſaid Burrough of *Linlithgow*, - - - - - - - - - - } RESPONDENTS in the Original, and APPELLANTS in the Croſs Appeal.

CASE of *Henry Gillies*, and others.

Conſtitution of the Burrough of *Linlithgow*.

BY the Conſtitution of the Burrough of *Linlithgow*, the Council, in whom the Government of the Burrough is veſted, conſiſts of TWENTY SEVEN Perſons; NINETEEN of theſe are Merchant-Councellors, the remaining EIGHT are Deacons, choſen annually by Eight Incorporations, *viz.* The Smiths or Hammermen, the Taylors, Baxters, Shoemakers, Weavers, Wrights, Coopers, and Fleſhers: Of the Nineteen Merchant-Councellors, SEVEN are Magiſtrates or Office-Bearers, *viz.* One Provoſt, Four Baillies, a Deacon of Guild, and a Treaſurer.

Manner of Election of the Council.

The Council is re-elected every Year in the following Manner—The ſeveral Incorporations, on the *Saturday* before the 21ſt of *September*, (or on that Day if it happens on a *Saturday*) preſent to the Council, Liſts or Leets of three Perſons. The Council may reject any one of theſe three; and the Deacon of the following Year muſt be elected by each Incorporation from a Liſt conſiſting of the remaining Two and the Deacon then in Office.

Saturday before the 21ſt of September Corporations preſent Leets of three Perſons. One which Council may reject.

On the *Saturday* after the 21ſt Day of *September* in every Year, the Incorporations, after electing their new Deacons, preſent them to the Council, which then does not conſiſt as before of Twenty Seven Perſons, but of Nineteen only, becauſe the Eight Deacons, who before made Part of the Council, being now deprived of their Offices by the Choice of their Succeſſors, are no longer entitled to ſit in Council.

Saturday after the 21ſt of September Corporations preſent the Deacons elected.

Before the new Deacons can take their Seats, the Council is entitled to enquire concerning the Legality of their Elections, and to determine concerning double Returns from the Incorporations. If any of the Trades have acted irregularly in the Election of a Deacon, the Council may then appoint the Trade to make a new Election in a regular Manner.

After the Council has given Judgment with regard to the Election of all the new Deacons, one by one, ſuch Deacons, as are found regularly elected, take the Oaths to the Government, and the Oath of Office, all in a Body; and then, but not ſooner, make a Part of the Council.

The next Step in the annual Election is to make Choice of Twelve Merchant-Councellors for the enſuing Year, which is done the ſame Day, immediately after the new Deacons are received. The whole Nineteen Merchant-Councellors are not elected yearly, becauſe the Seven Office-Bearers or Magiſtrates continue another Year in the Council *ex officio*. The Twelve new Councellors are choſen one by one, and the whole Council, conſiſting of Twenty Seven, including the new Deacons, are entitled to vote in the Election of each.

The laſt Step of the Election is to chooſe, from among the Nineteen Merchant-Councellors, the Seven Magiſtrates or Office-Bearers for the enſuing Year, which is done on the *Monday* after the Election of Councellors.

When

State of the Case.

When a Competition happens between two Parties in the Council, that Party, which is ſuperior in Number amongſt the Merchant-Councellors, has the ſole Power of determining in the firſt Inſtance upon the Rights of the two Deacons; and that Party, which is ſuperior after the new Deacons are received, muſt continue ſuperior in the new Council for the following Year, becauſe they have the abſolute Power of chuſing what Perſons they think proper, as the twelve new Councellors.

But in order to determine in the Caſe of a Separation, who are the Majority in the Senſe of the Acts 7th and 16th of the King, prohibiting Separations, the Judgment of the Council, with regard to the new Deacons, whether right or wrong, muſt be the Rule. — If the Majority of the Merchant-Council, without the old Deacons, determine upon double Returns, or do reject any Number of Deacons upon Objections ſtated againſt their Elections, tho' theſe Judgments may be afterwards reverſed by ſuperior Courts, yet the Deacons received, and not theſe who are rejected, muſt be numbred, in order to determine the Majority *in poſſeſſione* in the Senſe of theſe Statutes.

Scheme laid to alter the Management of the Burrough.

John Buckney, for many Years preceding *Michaelmas* 1754, had been continued by the unanimous Voice of the Council in the Office of Provoſt of this Burrough.—A Scheme however was formed to alter the Management and Direction of this Burgh; Attempts were in vain made to bring over Mr. *Buckney* to theſe Meaſures; at laſt a conſiderable Debt due by Mr. *Buckney*, which had not even been demanded for a very long Time, was purchaſed for about one Third of the Value, and legal Execution was immediately iſſued upon this antiquated Claim, in order to force Mr. *Buckney* into Meaſures, which no Temptations could influence him to embrace.

Purchaſe of an old Debt due by Provoſt *Buckney*, and legal Execution iſſued thereon.

The Appellants Party in the Council, at this Time conſiſted of eleven Merchant-Councellors, including Mr. *Buckney* then Provoſt, and his Son *Andrew Buckney*, and of one Deacon, making in all Twelve.—The Diligence againſt Mr. *Buckney* was puſh'd on with ſuch Eagerneſs and Rapidity, that he had ſoon before his Eyes the Proſpect of Ruin to his Family, and of Impriſonment to himſelf. In this Situation, Propoſals were made to him, that, if he and his Son would become bound to deſert the Duty of their Offices, and ſurrender the Town to the new Intereſt, his Perſon ſhould be ſafe, and all his Moveables be preſerved from legal Diligence.

Propoſals to Provoſt *Buckney* for withdrawing ſaid Execution, if he and his Son would deſert the Duty of their Offices.

Mr. *Buckney* had no Choice but to accept of theſe Conditions. His Son, to protect his Father, came under the ſame extraordinary Obligation; and both of them ſubſcribed a Writing, by which they obliged themſelves, that they ſhould not, from that Time, directly or indirectly, concern themſelves with the Elections of Deacons, Counſellors or Magiſtrates, at the Burgh of *Linlithgow*, or any ways oppoſe the Intereſts of Meſſrs. *Thomas* and *Lawrence Dundaſs*, in that Burgh, but ſhould allow themſelves to be turned out of the Council at *Michaelmas* 1754. The Sanction annexed to this Obligation was, That if Mr. *Buckney* or his Son ſhould, in the leaſt Degree, act contrary thereto, then Mr. *Dundaſs* ſhould be at full Liberty to put all Manner of Diligence in Execution upon the Debt which he had purchaſed. And, in Conſequence of this extorted Obligation, Provoſt *Buckney* and his Son, contrary to their Duty and Inclination, abſented themſelves from the Council.

Mr. *Buckney* obliged to comply with this Propoſal, and he and his Son ſign an Obligation to that Effect.

21 *Sept.* 1754. Upon this Day, on which, by the Conſtitution of the Burrough, Liſts from the ſeveral Incorporations were to be preſented to the Council as aforeſaid, Double Returns of Liſts appeared from three of the Incorporations, *viz.* the Wrights, Coopers and Fleſhers. At this Meeting the whole Members of Council attended, except Mr. *Buckney* and his Son; and the Numbers ſtood, NINE Merchant-Councellors and ONE Deacon for the Appellants, againſt EIGHT Merchant-Councellors and SEVEN Deacons for the Reſpondents.

21 *Sept.* 1754. Double Returns from the Wrights, Coopers, and Fleſhers.

Tho' in each of the Double Returns of Liſts or Leets, thoſe returned for the Appellants ought to have been preferr'd to the others, yet as the Reſpondents were then ſuperior in Number in Council, they approved of the Liſts preſented by their own Party, imagining, that tho' at the next Meeting of the Council, at which the new Deacons were to be preſented, where only Merchant-Councellors could ſit, they would be inferior in Number to the Appellants, yet that their previous Judgments concerning the Liſts would prevent the Council at next Meeting from receiving the Deacons choſen by the Majority, unleſs choſen out of the Liſts approved of by the Reſpondents.

Reſpondents being ſuperior in Number by the Abſence of Provoſt *Buckney* and his Son, prefer the Liſts of Reſpondents to thoſe of Appellants, which ought to have been preferr'd.

In Conſequence of this Plan, a Liſt choſen by five of the Wrights was preferred to another Liſt choſen by twelve, and a Liſt choſen by four of the Coopers

was

was preferred to one chosen by five, and a List chosen by four of the Fleshers, under the Influence of an illegal Force, on an unusual Day, and at an unusual Hour and Place, was preferred to a List chosen by an equal Number of the Incorporation acting in a regular Manner, at the usual Time and Place of Meeting.

Sept. 1754. ng of Council receiving the ons.

At the next Meeting of Council for receiving the Deacons on this Day, seventeen Merchant-Councellors were present, the remaining two, Mr. *Buckney* and his Son, being illegally with-held from the Meeting by the Respondents Party, nine of the seventeen were of the Appellants Number, and eight only of the Respondents.

Of the Eight new Deacons presented to the Council, two were unanimously received, *viz. John Rule*, Deacon of the Baxters; and *Andrew M'Kowan*, Deacon of the Taylors; the first of whom voted afterwards with the Appellants, and the second againſt them. Three Deacons were rejected because of the Informalities that attended their Election, *viz. John Davy*, Deacon of the Smiths; *William Smith*, Deacon of the Shoemakers; and *William Wardrop*, Deacon of the Weavers. Each of the remaining three Incorporations presented two Deacons as they had formerly presented two Leets. The Majority of the Council preferred *John Laurie* as Deacon of the Wrights, because chosen by Eleven of the Incorporations, tho' he was not one of the List approved of at the preceding Meeting of Council, to *William M'Donald*, who was chosen out of that List but only by five of the Incorporations: They also preferred *John Montgomery* as Deacon of the Coopers, who was one of both Lists presented to the Council for that Trade, and was chosen by five Members of the Incorporation, to *Alexander Nimmo* who was chosen only by four Members: And they preferred *Thomas Whyte* as Deacon of the Fleshers, who was not of the List approved by the Council, but was chosen by five of the Trade acting in a regular Manner at the usual Place, to *John Frame* who was chosen by an equal Number of the Incorporation acting under the Influence of an illegal Force, at an irregular Place of Meeting.

The Majority of the Council thus continued on the Side of the Appellants after receiving the new Deacons. One Deacon only of the Respondents Party was received by the Council, *viz.* The Deacon of the Taylors, by which their Number was increased to Nine; three Deacons were rejected, and the remaining four, who were received, voted afterwards with the Appellants, by which the Appellants Number was encreased to Thirteen; and the Appellants then elected the Merchant-Councellors.

Sept. 1754. llants Meeting hoice of Ma-es.

The Appellants (the regular Council) met on the 30th of *September* 1754, and chose seven Magistrates for the following Year, who all exercised the Offices to which they were severally elected by their Elections.

ation by Re-ents.

The Respondents on the other Hand, soon after the Council met on the 28th of *Sept.* enraged by the first Vote of the Council, rejecting the Deacon of the Smiths, thought proper, in Contradiction to the Statutes of the 7th and 16th of his present Majesty, to separate themselves from the Appellants, and then elected a separate Preses and Clerk, proceeded to receive the three rejected Deacons, and the three Deacons of their Party on the double Returns, and made a separate Election of Merchant-Councellors, and afterwards of Magistrates, by themselves.

ions of Reduc- nd Declarator ht by both s.

Thus at *Michaelmas* 1754, two Setts of Magistrates and Councellors were chosen in the Burrough of *Linlithgow* by opposite Parties; and Actions of Reduction and Declarator were brought by either Party before the Court of Session in Terms of the said Statutes of the 7th and 16th of the King.

ection to Ap- t's Action, that d not made t *Buckney* and n Parties.

It was objected againſt the Appellant's Summons of Reduction and Declarator, that all the proper Parties were not called, because Provost *Buckney* and his Son were neither Pursuers, nor called as Defenders in that Summons.

wer to the said tion.

It was answered, *inter alia*, that Provost *Buckney* and his Son had avowedly united themselves with the Appellants, to whom they had always adhered: That it was solely upon Account of an illegal Obligation which had been extorted from them by the Respondents, that they had not allowed their Names to be added as Pursuers in the Appellants Summons; and that it would have been absurd to have made them Defenders in that Action, because their Interest was exactly the same with that of the Appellants: And further, That it was not necessary to call them, though they were Members of the Council for the Year 1753, and were re-elected at *Michaelmas* 1754, yet they had never accepted of their Offices for the Year 1754, nor had taken the necessary Oaths. The

Lord Ordinary ſuſtains ſaid Objection and finds no Proceſs.

The Lord Ordinary however, on the 14th of *January* 1755, was pleaſed to SUSTAIN the Objection made by the Reſpondents; That *John* and *Andrew Buckneys* were not called or made Parties in the Appellants Proceſs, and therefore FOUND no Proceſs.

This Interlocutor was afterwards adhered to by the Lord Ordinary, and by the whole Lords on a Reclaiming Petition.

Pleadings on the Part of the Reſpondents.

It was then inſiſted for the Reſpondents, That as no Action had been brought by the Appellants for reducing the Reſpondents Election within the two Months allowed by the Statutes of the 7th and 16th of the King, that Election could not now be ſet aſide. At the ſame Time it was contended, that the Reſpondents were entitled to ſet aſide the Appellants Election by their Proceſs of Reduction and Declarator, which they had regularly brought within the two Months.

Anſwer for the Appellants.

On the other Hand the Appellants contended, that no Law or Statutes required that the Majority *in Poſſeſſorio* ſhould bring any Action for eſtabliſhing their Right, altho' the Minority muſt neceſſarily take that Method. If the Intention of the Statutes ſhould be ſuppoſed different, and that in the Caſe of two Elections neither Party ſhould happen to bring their Action within two Months, or that their Summonſes were both informal, Matters would be rendered inextricable. 2dly. It was contended, that the Appellants Election would neceſſarily be eſtabliſhed in judging upon the Reſpondents Reduction and Declarator, becauſe, if the Court ſhould be of Opinion that the Reſpondents had no Title to the Magiſtracy, and that the Appellants Election could not be reduced, theſe Judgments would be ſufficient to ſecure the Appellants in the legal Government of the Burrough.

Court of Opinion that the Merits of both Elections might be tried in the Reſpondents Action, and therefore ordered a Proof to be taken by both Parties.

The Court being of Opinion that the Merits of both Elections might be properly tried in giving Judgment upon the Reduction and Declarator brought by the Reſpondents, a Proof was allowed to both Parties of the different Facts by them ſeverally ſet forth.

Debate on ſaid Proof on behalf of the Appellants.

When this Proof was taken, and came to be debated in Court, it was contended for the Appellants, that the Reſpondents Election was void and null. 1ſt, Upon Account of the Force, in order to with-hold Provoſt *Buckney* and his Son from the Meetings of Council. 2dly, Becauſe the Reſpondents, while they were the Minority of the Town Council, aſſembled, ſeparated themſelves from the Appellants the Majority, choſe a ſeparate Preſes and Clerk, received a different Sett of Deacons, choſe different Merchant-Councellors, and afterwards elected ſeparate Magiſtrates, who all of them took upon them to act as the legal Council and Magiſtrates of the Burrough. By which Proceedings it was contended, in Terms of the Act 7th of the King, that their Election was void and null; and that they were ſubjected to the Penalties impoſed by that Statute; and alſo to the Penalties contained in the Statute 16th of the King. And 3dly, It was contended, that, independent of the Force and of the Separation, the Reſpondents Election could not be ſupported, becauſe they were not only the Minority when the Council met on the 28th of *September*, and at the Time of the Separation, but continued, through the whole Steps of Election, to be the Minority of thoſe who had Right to elect the New Council: That if the Judgments of the Council, with regard to the New Deacons, were founded in Law, the Appellants were Thirteen to Nine of the Council intitled to elect the New Merchant-Councellors, and to that Number Provoſt *Buckney* and his Son were to be added, becauſe illegally detained by the Reſpondents. But although the three rejected Deacons ſhould be added to the Reſpondents Number, and the Judgments of the Council ſhould be ſo far varied, yet the Numbers would ſtill ſtand Fifteen to Twelve.

It was ſeparately contended, in Support of the Appellants Election, that ſuppoſing the Election made by the Reſpondents to be ſet aſide, either upon Account of the illegal Force uſed againſt Provoſt *Buckney* and his Son, or upon Account of their Separation, the neceſſary Conſequence would be, that the Appellants Election muſt be ſuſtained, becauſe the Effect either of the Force or of the Separation was not only to annul the Election made by the Reſpondents, but to render all their Actings and Proceedings ineffectual, as if they had not acted at all, and therefore to transfer the ſole Right of Electing to the Appellants. And 2*dly*, It was contended for the Appellants, that tho' no Force had been uſed by the Reſpondents, and altho' they had not ſeparated, yet the Appellants Election muſt be ſuſtained, becauſe made by the legal Majority of of thoſe who had Right to elect the New Council.

On

rgument on the of the Reſpon-ts.

On the other Hand, it was contended for the Reſpondents, that the Debt againſt Mr. *Buckney* was not in the Perſon of Mr. *Laurence* or Mr. *Thomas Dundaſs* who were ſaid to be the Leaders of the Reſpondents Party, but belonged to their Father; and the Obligation by Mr. *Buckney* and his Son was granted to that Gentleman.

nſwer by Appel-

It was anſwered for the Appellants, that the Debt againſt Mr. *Buckney* was only a Truſt in the Perſon of the Father, for the Behoof of one of the Sons. This, as well as the Import of the Obligation itſelf, is proved by the Oath of Mr. *Dundaſs* of *Philipſton*, Advocate; and by the Oaths of Mr. *Robert Bruce* and Mr. *Ramſay* of *Blackcraig*: And the Fact was further offered to be proved by the Oath of Mr. *Laurence Dundaſs*, one of the Reſpondents.

rguments for ondents, with rd to the Sepa-n.

With Regard to the Separation, it was pleaded for the Reſpondents, That their Election could not be declared null, becauſe the Act 7th of the King, in ſo far as it impoſes a Nullity upon thoſe who ſeparate, is virtually repealed by the Act 16th of the King, by which it is provided, that the Election made by the Minority may be declared by the Court of Seſſion.

nſwer for Ap-nts.

It was anſwered for the Appellants, that the Act 16th of the King does not provide that the Election made by the Minority may be declared, notwithſtanding their Separation; but, on the contrary, expreſly prohibits Separations in every Caſe. The Election of the Minority can only be declared in Terms of that Act, when they ſubmit themſelves to the Majority in all the Steps of the Election, and proceed no further than to declare in the Meeting for what Perſons they give their Votes.

rther Argu-s for Reſpon-

It was further argued for the Reſpondents, that tho' they had indeed ſeparated themſelves at firſt from the Appellants, yet they had ſoon after joined again with the Council. That if it were true they had ſeparated, they could not be reckoned the Minority; becauſe the old Deacons, ſeven of whom were of the Reſpondents Party, were entitled to continue and vote in Council till the new Deacons were admitted; and upon this Footing, the Reſpondents, at the Time of Separation, were fifteen to ten of the Council.

ſwer for Ap-ts.

It was anſwered for the Appellants, That the Separation was clearly proved by the Evidence in Court. That tho' it were ſuppoſed that the Reſpondents had not ſeparated in the Meeting itſelf, yet as they made a ſeparate Election of Magiſtrates, Counſellors, and Deacons, who took upon them afterwards to act in theſe Characters; this was a Separation in Terms of the Acts 7th and 16th of the King. That it was alſo proved from the Records of Council, and by the Oaths of many of the eldeſt Witneſſes, that the Council for receiving the new Deacons, conſiſts of the Merchant-Counſellors only: That as the Conſtitution or Sett of Burroughs depends entirely upon antient Uſage, the uniform Practice in this Burrough is full Proof that the old Deacons had no ſuch Right as is pretended. That the written Sett of this Burrough, which is only an Atteſtation of the antient Uſage, does not ſupport that Claim: That the Words, Council, and old Council, are there made Uſe of in various and inaccurate Senſes; the new Merchant Council is there ſaid to be choſen by the old Council; but it is certain the new Deacons and not the old vote in the Choice of the new Merchant Council: That if the old Deacons had a Right to vote in receiving their Succeſſors, yet as it is not pretended they have poſſeſſed it for above 60 Years, They could not aſſume that Right without an Action of Declarator; and therefore in judging of the Merits of the Election at *Michaelmas* 1754, their Votes could not be legally numbered in order to determine who were the Majority at the Time of the Separation.

If the old Deacons had no Right, the Appellants were nine to eight of the Council which met for receiving the new Deacons, and they continued the Majority ever after; becauſe whether the Judgments they have pronounced with Regard to the new Deacons were right or wrong, theſe Judgments *in poſſeſſorio* muſt be held as good, in order to determine who were the Majority in the Senſe of the Acts 7th and 16th of the King.

ments for dents in Sup-*William* d's Right, con of the in Prefer-*John Laurie*.

It was argued for the Reſpondents, in Support of the Right of *William M'Donald*, as Deacon of the Wrights, in Preference to *John Laurie*, that the Majority of the Trade, who voted for *John Laurie*, had entered into an unlawful Engagement, and that thereby the ſole Right of electing was transferred to the other Members of the Incorporation. And 2dly, That as *John Laurie* was not one of the Leet approved of by the Council, a Reduction of the Judgment of the Council, with regard to the Leets, was neceſſary to eſtabliſh his Right as Deacon.

ers for the nts.

It was anſwered for the Appellants, that the Wrights had come under no unlawful Obligation. That the Paper referred to, is intitled, *Voluntary Conſent of the Wrights in Linlithgow*, and is of the following Tenor, " At *Linlithgow*

" 25th

"24th *February*, 1754 Years, We the Subscribers have unanimously agreed "to make Choice of a Deacon to represent our Craft in Council against *Michael-*"*mas* next out of our own Number, as witness our Hands." This is signed by twelve Members.

It is evidently an Agreement, enforced by no Penalty, and from which no stronger Obligation arose than from a simple Promise, that as *John Laurie* was chosen by an undoubted Majority of the Trade, no Reduction of the Judgment of the Council on the Leets was necessary, since he was possessed of the Right of being Deacon by the Judgment of the Majority of that Meeting of Council, which was entitled to receive the new Deacons.

The Court of Session upon the 7th *August*, 1755, pronounced the following Judgment.

Interlocutor of the whole Lords appealed from.

"The Lords having advised this Process, Testimonies of Witnesses adduced, "Writes produced, with the Debates thereon, *They repel the Objections made to* "*the Elections of* John Davy, *as Deacon of the Hammermen or Smiths*, William "Smith as *Deacon of the Shoemakers, and* William Wardrop *as Deacon of the* "*Weavers*. And FIND, *that each of them were regularly elected Deacons from* "*their respective Incorporations at* Michaelmas *last; as also sustain the Election of* "William M'Donald *as Deacon of the Wrights, and prefer his Election to that* "*of* John Laurie: And with Respect to the Election of the Deacon of the "Coopers, FIND, that *William Young* was not a Freeman of that Trade at "*Michaelmas* last, and therefore had no Right to vote at that Election; but that "*John Brown* was a Freeman, and entitled to vote thereat; and therefore "SUSTAIN the Election of *John Montgomery* as Deacon of the Coopers, and "prefer him to *Alexander Nimmo*: *As also* SUSTAIN *the Election of* John Frame "*as Deacon of the Fleshers, and prefer him to* Thomas White. And with regard "to the Point whether or not the old Deacons were entitled to sit and vote at the "last *Michaelmas* Meeting, as constituent Members of the Council, FIND, that "*in possessorio* the old Deacons were lawfully excluded from voting at the Meet-"ing upon the 28th of *September* last. And in Respect of the Pursuers Separation "from the Majority of the Council upon the said 28th of *September*, refuse to "declare the Election of the Pursuers as Magistrates and Counsellors, and "ASSOILZIE the Defenders from the Declarator brought at their Instance, "*but* FIND *and* DECLARE *the Elections of the Counsellors and Magistrates, made* "*by the Defenders at* Michaelmas *last, illegal, void and null, and* REDUCE, DE-"CERN and DECLARE accordingly: As also allow the Decreet to be extracted, "*reserving to either Party to be heard against* November *next, upon the Question* "*whether the old Deacons have Right to sit and vote in the Council, ay, and while* "*their Successors are admitted.*"

This Part appealed from by Original Appeal.

This Part in Favour of *John Montgomery*, appealed from by the Cross Appeal.

This Part appealed from by the Original Appeal.

This Part appealed from by the Cross Appeal.

This Part, finding the Appellants Election void, appealed from by the Original Appeal.

Reclaiming Petition for Appellants.

Against this Judgment the Appellants offered a reclaiming Petition, praying, that as the Court had almost unanimously found, that the Respondents while a Minority of the Council, had separated themselves from the Appellants; so their Lordships should further find, as a necessary Consequence, that the Apellants Election was made by the unanimous Voice of all those whose Votes after the Separation could be legally numbered.

Stat. 7. *Geo.* II. for better regulating Elections. § 6.

That by the Statute 7th of the King, for the better regulating the Election of Members, *&c.* for *Scotland*, it is Enacted, "That *in the annual Election* "*of Magistrates and Counsellors for Boroughs, no Magistrate or Counsellor, or any* "*Number of Magistrates or Counsellors, shall, for the future, upon any Pretence* "*whatsoever, take upon him or them to separate from the Majority of the Magi-*"*strates and Counsellors, who have been such for the Year preceding, and to appoint* "*or elect separate Magistrates or Counsellors; but shall submit to the Election made,* "*and to the Magistrates and Counsellors elected and appointed by the Majority* "*of the Town-Council assembled. And if, contrary to the Direction of this* "*Act, any Number of Magistrates or Counsellors shall, in Opposition to the* "*Majority, take upon them to make a distinct and separate Election of Magi-*"*strates or Counsellors, their Act and Election shall be* ipso facto *void, and* "*every Magistrate or Counsellor, who concurred therein, shall forfeit and lose* "*the Sum of* 100 l. *Sterling, to be recovered by the Magistrates and Counsellors* "*from whom they separated.*" That this Statute is further explained and enforced by a Clause in the Act 16th of His present Majesty in these Words,

Stat. 16. *Geo.* II.

"*That at the annual Election of Magistrates and Counsellors, and in all the Pro-*"*ceedings previous to the Election of Magistrates and Councellors for the succeeding* "*Year, it shall not be lawful for the Minority of any Meeting for Election either* "*of Magistrates, or Counsellors, or Deacons, or other Persons, who, by the* "*Constitution of the respective Boroughs, may have Votes in the Election of the* "*Magistrates or Counsellors, to separate from the Majority of those having a*

"*Right*

"Right to act by the Conſtitution of the Burgh at ſuch Meetings upon any Pre-
"tence whatſoever; nor to make any ſeparate Election of Magiſtrates, Counſellors,
"or Electors, but the Minority ſhall, in all Caſes, ſubmit to the Election made
"by the Majority in all the Parts of Election; and if any Perſon, elected by the
"Minority of any ſuch Meeting, ſhall preſume to vote in the Election of Magi-
"ſtrates or Counſellors, or in electing the Magiſtrates or Counſellors, or in any
"other Step of the Election, he ſhall forfeit the Sum of 100 l. Sterling to any
"one of the Majority of ſuch Meeting." That the Words and evident Intention of both theſe Statutes, import, that in every Caſe the whole Proceedings of thoſe who ſeparate from the Majority muſt be void and null, and the ſole Right of acting and electing muſt of Conſequence be veſted in the Majority of Council, who proceed in a Manner agreeable to Law.

The Appellants further prayed the Court to find, in the 2d Place, that the Force uſed againſt Provoſt *Buckney* and his Son, was ſufficient not only to annul the Reſpondent's Election, but to transfer the ſole Right of electing to the Appellants, or at leaſt 3dly, to find, that *John Laurie* was the only legal Deacon of the Wrights, as being elected by Eleven of the Incorporation; whereas *William M'Donald* was elected only by *Five*; and that *Thomas Whyte* was the only legal Deacon of the Fleſhers, or at leaſt that the Election of *John Frame* could not be ſuſtained; and further, that upon Account of the Force uſed againſt Provoſt *Buckney* and his Son, their Votes muſt at leaſt be numbred upon the Side of the Appellants; and that therefore the Appellants were in every View the Majority at the Time of electing the new Merchant-Counſellors, as conſiſting of eleven Merchant-Counſellors, including Provoſt *Buckney* and his Son, and four Deacons, *viz.* the Deacons of the Baxters, Coopers, Wrights, and Fleſhers.

Aug. 1755. Interlocutor of the Lords appealed from.

This Petition came to be conſidered by the Court upon the laſt Day of the Seſſion, and "*was refuſed without Anſwers.*"

A Petition was the ſame Day preſented upon the Part of the Reſpondents, and another Petition for *Alexander Nimmo*, pretended Deacon of the Coopers, againſt that Part of the Interlocutor, which ſuſtained the Election of *John Montgomery* in Preference to him, the Court was pleaſed to refuſe the Reſpondents Petition without Anſwers, and to order that the Petition of *Alexander Nimmo* ſhould be anſwered.

Dec. 1755. Interlocutor ſealed from by Croſs Appeal.

And Anſwers having been accordingly put in for the Appellants, the Court on the 9th of *December* 1755, refuſed the Deſire of the Petition, and adhered to their former Interlocutor.

The Appellants, when the Time for a new annual Election returned in *September* 1755, elected in common Form a Sett of Deacons, Counſellors, and Magiſtrates, for the Year from *Michaelmas* 1755; who, if the Judgment of the Court of Seſſion ſhall be varied, will be entitled to the legal Magiſtracy and Government of this Borough, and will elect their Succeſſors at *Michaelmas* next.

Againſt theſe Interlocutors, of the 7th and 9th of *Auguſt* 1755, as is above-mentioned, the Appellants have brought their Appeal, and hope the ſame will be reverſed, varied, or amended, for the following among other

REASONS.

I. As the Separation made by the Reſpondents is clearly proved, and has been ſuſtained by the Court as ſufficient to annul the Reſpondents Election, it muſt neceſſarily be attended with this further Conſequence, that the Election made by the Appellants be ſuſtained, as made by the only Perſons, who, after the Separation, had Right to act, or whoſe Votes could be numbered.

II. That the Election of *John Laurie* as Deacon of the Wrights, as being made by a great Majority of the Trade, was evidently preferable to the Election of *William M'Donald*; and the Election of *Thomas Whyte* for the Fleſhers, was alſo preferable to the Election of *John Frame*, at leaſt the Election of *John Frame*, made under the Influence of illegal Force, at an unuſual and illegal Place, could not be ſupported in Law: That the Vote of the Deacon of the Wrights or Fleſhers, with the Votes of Provoſt *Buckney* and his Son, being added to the Appellants Number, gave them a clear Majority at the Time of electing the new Merchant-Counſellors, though no Force had been uſed, and though no Separation had happened.

And

And the Appellants humbly hope that the Cross Appeal will be dismissed,
and the Judgments complained of, as is above-mentioned, affirmed, for the following among other

REASONS.

I. That the Election made by the Respondents is clearly proved, and it is
Constitution of the Burgh, whereby the old Deacons have no Right to sit in Council after their
Acts 7th and 16th of the King were incurred.

II. That the Election of *John Montgomery*, Deacon of the Coopers, was pre-
sable to that of *Alexander Nimmo*; because *John Brown*, one of
Montgomery's Electors, was not only properly received a Freeman of the
Incorporation of Coopers, but had constantly exercised the Privilege of a
Freeman from the Time of his Admission; whereas *William Young*, who
voted for *Alexander Nimmo*, was neither regularly admitted, nor was ever
inrolled in the Books of the Trade, and at no Period had executed the
Privileges of a Freeman. The Votes in Favour of *John Montgomery*,
including *John Brown*, were thus, FIVE against FOUR.

W. MURRAY.
RO. DUNDAS.

1754.

Allan Wauch, et al' { Respondents in the Original, and Appellants in the Cross Appeal.

CASE of *Henry Gillies*, and others.

To be heard at the Bar of the House of LORDS, on the Day of 1756.